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Criminal Trials and Truth

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Abstract

The traditional account of the criminal trial holds that its fundamental purpose is to search for the truth—that is, the truth of whether the accused factually committed the alleged crime. However, purely truth-seeking accounts, as well as more nuanced side-constraint and pluralist accounts, fail to adequately explain the relationship between the epistemic principles and those of political morality shaping the criminal trial. In response, this article proposes that we understand the criminal trial first and foremost in terms of its purpose as a public procedure concerned with the legitimate use of coercive state powers against a particular person. Specifically, the criminal trial is a procedure that calls upon the state to provide a public justification for exercising its criminal law powers to convict and punish the accused. This account preserves the importance of establishing factual guilt because doing so is an essential part of the state's justificatory burden.

Keywords: *criminal trials; truth; side-constraints; pluralism; public justification*

Introduction

It is a commonplace that criminal trials are a search for truth. The Supreme Court of the United States, for example, has stated that "the basic purpose of a trial is the determination of truth."[1] The Supreme Court of Canada has concurred: "The ultimate aim of any trial ... must be to seek and to ascertain the truth."[2] This view is also widely shared by legal scholars. Larry Laudan, in his monograph focused on the role of truth in criminal law, writes that "a criminal trial is first and foremost an *epistemic* engine, a tool for ferreting out the truth."[3]

Despite its popularity, a truth-seeking account of the criminal trial faces significant challenges. While few contemporary theorists would defend a purely epistemic account—that is, the view that the trial's sole purpose is to determine whether the accused factually committed the alleged offence—it is useful to consider the truth-seeking approach in this idealized form (hereafter, the 'epistemic account') to highlight the difficulties that more nuanced accounts must confront. First, the epistemic account fails to fit the actual practice of criminal trials in

1. *Tehan v United States*, 382 US 406 (1966) at 416 [*Tehan*].
2. *R v Nikolovski*, [1996] 3 SCR 1197 at para 13 [*Nikolovski*].
3. Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press, 2006) at 2 [emphasis in original].

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modern common law legal systems. Such systems contain numerous evidentiary and procedural rules that exclude probative evidence and allow criminal trials to be resolved for truth-irrelevant reasons. The epistemic account has no straightforward explanation for rules like the exclusion of unlawfully obtained evidence or the accused's right to silence. These rules appear grounded in norms of justice rather than truth. Second, the epistemic account fails to provide a normatively attractive picture of the criminal trial in a public legal order. That a trial arrives at the truth of the accused's factual guilt is not sufficient to justify the state's use of coercive force against that individual. The problem with guilty verdicts reached on the basis of egregious state misconduct is not merely that such misconduct may produce unreliable evidence. Even if a confession obtained through torture is accurate and the accused is in fact guilty, any conviction and subsequent punishment secured through such a serious violation of the accused's rights would be illegitimate.

In response to these challenges, those sympathetic to a predominantly epistemic understanding of the criminal trial tend to resort to one of two less purely truth-seeking accounts. The first maintains that the underlying aim of the criminal trial is to determine the truth but recognizes that independent normative considerations may constrain that search process. The second holds that determining the truth is one of multiple purposes of the criminal trial.

While the side-constraint and pluralist accounts each have advantages over the epistemic account, neither provides an entirely satisfying explanation of the relationship between the normative and epistemic principles governing criminal trials. Both accounts suggest that these principles are often in tension. But such a tension is at odds with most legal systems and judges' seemingly more holistic understanding of the trial. Drawing on recent work that calls for an account of the criminal law grounded in the political morality of the state, this article develops an account that takes the criminal trial's normative rather than epistemic features as its foundation. That is, in contrast to the usual strategy of beginning with the truth-seeking function of the trial and then attempting to explain its normative principles in light of that function, this account begins with the normative purpose of the trial and then explains the significance of establishing the truth in light of that purpose.

According to the proposed account, the criminal trial should be understood first and foremost in terms of its normative purpose as an exercise in public justification. In a liberal legal order, where the individual is presumed innocent and state coercion always requires justification, the criminal trial calls upon state officials who seek to exercise the state's powers to convict, condemn, and punish criminal wrongdoers to publicly justify the use of these powers against the accused.[4] Under this view, the criminal trial shares with other public institutions

4. The account developed in this article builds on ideas in Hock Lai Ho's work on the relationship between liberalism, the rule of law, and criminal trials. However, as explained below, the public justification account differs in important ways from Ho's own account of the trial: see Ho, *infra* notes 74, 75.

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a fundamental concern with the legitimate use of state power. But the state's burden of public justification in a criminal trial is not to justify the criminal law or justice system as such. It is more specific. The criminal trial is a forum in which the state must justify the use of certain coercive criminal law powers against the particular defendant for the particular alleged offence. This account maintains the significance of establishing the truth through the trial process because establishing the accused's factual guilt is an essential part of the state's justificatory burden. The public justification account avoids the challenges facing the epistemic, side-constraint, and pluralist accounts because it shows how the trial's epistemic and normative dimensions are integral and harmonious aspects of a unified purpose. This account emphasizes how the criminal trial is a public process connected to the state's claim to legitimate authority, not a peculiar form of quasi-scientific inquiry.

On the account I defend, truth matters because a conviction can only be legitimate if the state proves that the accused in fact committed the offence. It does not matter merely as an epistemic achievement or as one of the trial's multiple independent and competing aims. The importance of truth lies in its role within an integrated standard of public justification, where factual determination and normative constraints are inseparable conditions for the legitimate use of the state's coercive powers. In this way, the public justification account can be understood as a further development or specification of the side-constraint and pluralist accounts.

This article proceeds in three sections. Section 1 explores the epistemic account and raises the two objections against it. Section 2 discusses the advantages and limitations of the side-constraint and pluralist accounts. Section 3 develops the public justification account and distinguishes it from other normative accounts of the criminal trial.

1. The Epistemic Account

A. Criminal Trials as a Search for Truth

The idea that the point of the criminal trial is to determine the truth is widely shared by legal officials and scholars. It is expressed explicitly in much writing about criminal law and implicitly in yet more.[5] According to Laudan, there is

5. For explicit examples, see Andrew Ashworth & Mike Redmayne, *The Criminal Process*, 4th ed (Oxford University Press, 2010) at 299; Dale A Nance, "Truth, Justification, and Knowledge in the Epistemology of Adjudication" in Baosheng Zhang et al, eds, *Facts and Evidence: A Dialogue Between Philosophy and Law* (Springer, 2021) 89 at 89-90; John Rawls, *A Theory of Justice*, revised ed (Harvard University Press, 1999) at 74. For implicit examples, see Clayton Littlejohn, "Truth, Knowledge, and the Standard of Proof in Criminal Law" (2020) 197:12 Synthese 5253; Robert P Burns, "The Distinctiveness of Trial Narrative" in Antony Duff et al, eds, *The Trial on Trial, Volume One: Truth and Due Process* (Hart, 2004) 157; John Henry Wigmore, *Wigmore on Evidence: A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol 1A, revised by Peter Tillers (Little, Brown & Co, 1983) at 1019.

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"nearly universal acceptance of the premise that a criminal trial is a search for the truth about a crime."[6] It also enjoys common sense appeal. Undoubtedly, the question of whether the accused factually committed the crime is at the heart of almost every trial. But many truth-seeking accounts distinguish themselves as explanations of the criminal trial by holding that determining the truth is not merely an important aspect of the trial, but that it is its "basic purpose,"[7] "first principle,"[8] or "ultimate aim."[9] The criminal trial, on these views, is "first and foremost" an inquiry into the truth.[10] In other words, it is a process designed to discover an empirical fact or set of facts about the world.

Truth-seeking accounts find support in various doctrinal principles of evidence and criminal procedure. For example, two foundational rules of evidence appear to have a truth-seeking rationale. First, evidence must be factually relevant.[11] That is, evidence must be capable of making a fact at issue more or less likely to be true. Second, the probative value of evidence must not be substantially outweighed by its prejudicial effect, including by misleading or confusing the finder of fact.[12] In addition, one of the traditional justifications for the accused's fundamental procedural right to make a full answer and defence at trial is to "ensure that the innocent are not convicted."[13] These rules and many others clearly support a truth-seeking account of the trial.

While the judicial and scholarly quotes above leave room for values beyond determining the truth to shape the criminal trial, it is useful, as mentioned above, to begin by considering a purely truth-seeking account. Not only does the popular slogan that criminal trials are a search for truth, taken on its face, point toward such an epistemic account, but it also provides a useful heuristic for understanding the limitations that more complex truth-seeking accounts must overcome.

B. The Fit Objection

While the epistemic account aligns with many evidentiary and procedural rules, it struggles to explain others. Not only do these rules appear grounded in concerns other than determining the truth, but they regularly operate to exclude probative evidence and resolve cases for reasons other than truth. These rules often directly impede the trial's ability to uncover the truth and reach a verdict that expresses that truth. And yet they are considered essential principles of the criminal trial in

6. Laudan, *supra* note 3 at 2-3. Aspects of the framing and some of the quotes here draw on Laudan's work.
7. *Tehan*, *supra* note 1 at 416.
8. Heike Jung, "Nothing But the Truth? Some Facts, Impressions and Confessions about Truth in Criminal Procedure" in Duff et al, *supra* note 5, 147 at 147.
9. *Nikolovski*, *supra* note 2 at para 13.
10. Laudan, *supra* note 3 at 2.
11. See David M Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Irwin Law, 2020) at ch 2, s 3. See also the United States Federal Rules of Evidence: US, *Fed R Evid* at 401-2; *Evidence Act 1995* (Austl), 1995/2, s 55; *Evidence Act 2006* (NZ), 2006/69, s 7.
12. See Paciocco, Paciocco & Stuesser, *supra* note 11 at ch 2, s 3; *Fed R Evid*, *supra* note 11 at 403; *Evidence Act 1995*, *supra* note 11 at ss 135, 137; *Evidence Act 2006*, *supra* note 11 at s 8.
13. *R v Stinchcombe,* [1991] 3 SCR 326 at 336 [*Stinchcombe*].

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virtually all modern common law legal systems. In this way, the epistemic account fails to fit the legal process it purports to describe.

For example, there is a substantial body of evidentiary rules that often work to exclude evidence for truth-irrelevant (or non-epistemic) reasons. This includes the rules that prevent prosecutors from adducing evidence at trial obtained in violation of the accused's legal rights.[14] For example, evidence obtained through arbitrary detention or unlawful search is often excluded.[15] So too is evidence obtained in violation of the accused's right to counsel or silence.[16] Another body of procedural rules allows criminal proceedings to be resolved regardless of the accused's factual guilt. Courts often stay proceedings if a trial is unreasonably delayed or if the prosecutor fails to disclose all relevant evidence prior to the trial.[17] The rules encouraging and facilitating pleas also appear inconsistent with an epistemic understanding of the trial. Most charges result in convictions without a trial to search for and establish the facts. Finally, it is doubtful whether the epistemic account can make sense of other foundational features of the common law criminal trial, such as the presumption of innocence or the prosecutor's burden to satisfy the 'beyond a reasonable doubt' standard.

These evidentiary and procedural rules reveal the limitations of the epistemic account to fit the modern practice of criminal trials. These rules appear to be based on normative concerns (or what we might call norms of justice) regarding the accused's rights and wrongful police or prosecutorial conduct. If we understand the trial as an "epistemic engine," it is not clear how we can make sense of the rules that often restrain the trial's ability to arrive at the truth.

It is important to note that these normative evidentiary and procedural rules are not peripheral distractions or background aspirations. They routinely determine trial outcomes. Take the Supreme Court of Canada decision in *R v. Le*.[18] The accused was found to be in illegal possession of a gun, drugs, and the

14. See e.g. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 24(2) [*Charter*]; US Const amends IV, V, VI; *Police and Criminal Evidence Act 1984* (UK), c 60, s 78 [*Police and Criminal Evidence Act*]; *R v Grant* [2005] EWCA Crim 1089 (UK); *Evidence Act 1995* (Cth), 1995/2, s 138; *Evidence Act 2006* (NZ), 2006/69, s 30. For an overview of different legal systems exclusionary rules, see Hock Lai Ho, "Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis" in Darryl K Brown, Jenia Iontcheva Turner, & Bettina Weisser, eds, *The Oxford Handbook of Criminal Process* (Oxford University Press, 2019) 821; Jenia Iontcheva Turner, "Limits on the search for truth in criminal procedure: a comparative view" in Jacqueline E Ross & Stephen C Thaman, eds, *Comparative Criminal Procedure* (Edward Elgar, 2016) 35 at 35-74; Dimitrios Giannoulopoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Hart, 2019).

15. See e.g. *Charter*, *supra* note 14, ss 8-9; *R v Edwards* [1996] 1 SCR 128; *R v Therens*, [1985] 1 SCR 613; US Const amend IV; *Wong Sun v United States*, 371 US 471 (1963); *Nardone v United States*, 308 US 338 (1939).

16. See e.g. *Charter*, *supra* note 14, ss 7, 10(b); *R v Grant*, 2009 SCC 32 [*Grant*]; US Const amends V, VI; *Police and Criminal Evidence Act*, *supra* note 14, s 78; *Criminal Procedure (Scotland) Act 1995*, s 266; *Azzopardi v The Queen* [2001] HCA 25.

17. See e.g. *Charter*, *supra* note 14, ss 7, 11(b); *R v Jordan*, 2016 SCC 27; *Stinchcombe*, *supra* note 13; US Const amend VI; *Betterman v Montana*, 578 US 437 (2016); *Federal Rules of Criminal Procedure* Rule 16 (2024).

18. 2019 SCC 34.

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proceeds of crime. The Court nevertheless held that this evidence must be excluded, and the accused acquitted, because police officers had violated his constitutional right against arbitrary detention in obtaining it. There was no question that the accused was factually guilty of multiple possession offences, yet the Court insisted that the very evidence most probative of those charges—the gun, drugs, and cash in question—must be excluded. From the perspective of the epistemic account, such a principle and outcome appear to have undermined the trial's supposed ultimate aim of determining the truth.

Proponents of the epistemic account might respond to this challenge by arguing that, despite appearances, these rules can be justified under a truth-seeking rationale. For example, John Jackson argues that the rules designed to bring finality to the trial are "much more rational mechanisms for finding the truth than is sometimes supposed."[19] The rule on double jeopardy, for instance, incentivizes the police and the prosecutor to undertake a comprehensive investigation prior to commencing a trial. Alvin Goldman similarly contends that many of the constitutional rights that shape criminal trials, such as the right against self-incrimination and the right to a speedy trial, can be understood as truth-oriented in nature.[20]

However, this response is unconvincing for a few reasons. First, even if truth-seeking explanations are possible for some of these rules, these explanations are often strained. For example, the epistemic account may appear to provide a strong explanation for the rule barring coerced confessions. Involuntary confessions are often unreliable, and so their admission as evidence may subvert the search for truth. Yet there is generally no exception for coerced confessions that are verified through corroborating evidence. Suppose the accused's coerced confession reveals a piece of information that uniquely identifies them as the perpetrator and so confirms their factual guilt. Such a confession is nonetheless excluded.[21] While roundabout epistemic explanations may be possible for some of these rules, a more straightforward explanation would appeal directly to non-epistemic values, such as the accused's rights, the integrity of the trial, or the legitimacy of the verdict. Second, many of these rules simply have no plausible epistemic justification. There is no convincing truth-based reason for excluding directly probative material evidence—say, the murder weapon in question—because the police obtained such evidence without a warrant. Indeed, even those who insist that an epistemic rationale can explain many exclusionary and procedural rules concede that it cannot explain all such rules.[22] Third, even if these rules can be shown to promote accurate fact-finding generally, they often do not serve this

19. John D Jackson, "Managing Uncertainty and Finality: The Function of the Criminal Trial in Legal Inquiry" in Duff et al, *supra* note 5, 121 at 124.

20. See Alvin I Goldman, *Knowledge in a Social World* (Oxford University Press, 1999) at 285-89. For a more complicated version of this argument, see Larry Alexander, "Are Procedural Rights Derivative Substantive Rights?" (1998) 17:1 Law & Phil 19.

21. See Ho, *supra* note 14 at 829.

22. See Susan Haack, *Evidence Matters: Science, Proof, and Truth in the Law* (Cambridge University Press, 2014) at 34-35; Robert S Summers, "Formal Legal Truth and Substantive Truth in Judicial Fact-Finding: Their Justified Divergence in Some Particular Cases" (1999) 18:5 Law & Phil 497 at 502; Goldman, *supra* note 20 at 289.

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function in the specific trial in which they are applied (as demonstrated in *R v. Le*). The epistemic account appears committed to the view that such occurrences are unfortunate by-products of the need for such rules to be written in general terms and applied consistently, and that in an ideal system such rules would be applied only when their truth-seeking rationale is relevant.

It is possible that proponents of the epistemic account might instead concede this objection and argue that such exclusionary and procedural rules should be abandoned. In other words, one might respond to this challenge by advocating for inclusionary reform to evidence law so that criminal trials can more consistently attain their epistemic purpose. Bentham appears to have adopted something like this position, writing that "with a view to rectitude of decision ... no species of evidence whatsoever ... ought to be excluded" and that exclusionary rules are "incompetent ... to the discovery of truth, ... incompetent therefore ... to the purposes of justice."[23] More recently, William Pizzi has suggested that trials should be reformed to better reach the truth by deemphasizing the procedural rights of defendants.[24] But insofar as our aim is to understand the nature of criminal trials as they currently exist in modern legal systems, we can dismiss this response. For it acknowledges the epistemic account's inability to explain critical features of contemporary criminal trials. More importantly, it comes at too high a cost for an understanding of the trial that purports to be consistent with political liberalism—or any theory of the state that takes individual rights and interests seriously. Indeed, there are good reasons why liberal legal systems tend not to curtail defendants' rights even if it would mean greater accuracy in verdicts.

C. The Normative Objection

The epistemic account not only fails to fit many of the evidentiary and procedural principles of criminal trials, but it also fails to provide a normatively appealing conception of the trial. For if the point of the trial is to discover the truth, then it seems that our evaluation of a given trial process is reducible to whether its verdict corresponds to the accused's factual guilt. This view suggests that conviction—and, presumably, the punitive consequences of conviction—are legitimate as long as the accused committed the crime. But this suggestion is inconsistent with the widely shared sense that the justification of a criminal conviction (let alone punishment) depends not only on whether the accused factually committed the crime, but also on whether the state proved it. Suppose the state secretly, without a trial, convicted and punished a person who maintained their innocence. Public outrage would be appropriate regardless of whether the person was factually guilty. Public outrage would also be appropriate for a factually

23. Jeremy Bentham, "Rationale of Judicial Evidence" in John Bowring, ed, *The Works of Jeremy Bentham*, *Volume VI* (William Tait, 1843) 189 at 203-06.

24. See William T Pizzi, *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (NYU Press, 1998).

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accurate verdict reached through deliberate misconduct by prosecutors or the police.

The sense that even accurate verdicts can constitute injustices is perhaps most clear in the case of verdicts whose accuracy depends on sheer luck or coincidence.[25] Judith Jarvis Thomson provides the example of an accurate verdict reached by flipping a coin. She explains that "[i]t matters to us, not just that a defendant not suffer a penalty unjustly, but also that the penalty not be imposed on him unjustly."[26] The view that trials are for determining the truth has no resources to explain the uncontroversial claim that, in such cases, the trial has failed in its purpose.

One might object that although the epistemic account does not itself provide a normative explanation of the criminal trial, it can be combined with such an explanation. This objection would require showing that determining factual guilt is the trial's only normative purpose—that nothing beyond factual accuracy is needed to justify conviction. The difficulty, however, is that the only normative theory that makes factual guilt the sole value of the trial is a controversial and widely rejected version of moral retributivism. According to moral retributivism, the point of the criminal law is to identify moral wrongdoers and give them what they deserve as a matter of independent morality. A simplistic version of this view might say that this is all that matters. On this view, so long as criminal offences properly track pre-institutional moral norms, the sole normative function of the trial is to determine whether the accused is factually guilty, because that alone determines whether conviction and punishment are deserved.[27] Under this approach, the criminal trial is preferable to vigilante justice only because it is more reliable at identifying moral wrongdoers.

Something like this view was perhaps once defended by Michael Moore.[28] But it has few other supporters. Most criminal law theorists recognize that there is more to criminal justice than whether it tracks pre-institutional moral desert.

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25. But see Christopher Heath Wellman, "Procedural Rights" (2014) 20:4 Leg Theory 286. Wellman argues that using a lottery to decide who to punish for a crime would not be an injustice if the selected person had committed the crime. Wellman recognizes, however, that this "position obviously flies in the face of the standard view that each of us has a preinstitutional right not to be punished until we have been duly convicted in a fair trial" (*ibid* at 290). For the response that such a practice would be wrongful, see David Enoch, "In Defense of Procedural Rights (or Anyway, Procedural Duties): A Response to Wellman" (2018) 24:1 Leg Theory 40. For the response that it would not even count as criminal punishment, see Hamish Stewart, "Procedural Rights and Factual Accuracy" (2020) 26:2 Leg Theory 156.

26. Judith Jarvis Thomson, "Liability and Individualized Evidence" (1986) 49:3 Law & Contemp Probs 199 at 213.

27. Other simplistic instrumental explanations of the trial, like a basic utilitarian or deterrence explanation, might also seem compatible with the epistemic account. But even these explanations appear at least minimally committed to concerns beyond factual truth. For a trial (and corresponding conviction and punishment) to have a deterrent effect, it must be perceived as having integrity. This explanation requires, then, that the trial be viewed by the public as a fair and legitimate process—not merely that it arrives at the truth.

28. Although Moore does not express an explicit account of the trial, this view seems to follow from his position that the sole purpose of criminal law's institutions is to give moral wrongdoers deserved punishment. See Michael S Moore, *Placing Blame: A Theory of Criminal Law* (Oxford University Press, 1997) at 28, 151, 159.

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Specifically, most recognize that there are distinct public law concerns with the criminal law and its procedures.[29] The criminal justice system is not some social or interpersonal moral practice that exists independently of the state and the broader legal order. Whatever other moral principles are relevant to evaluating the criminal justice system, its evaluation must include principles for assessing the legitimate use of the state's coercive power. Even if one shares the moralist's view that the purpose of the criminal law is to enforce independent moral norms, it is hard to deny that there are special considerations of political morality for how the state goes about achieving that purpose. As I explain below, liberal and other prominent theories of the state capture this idea by emphasizing that the state has a burden to justify its use of coercive power over individuals in terms of shared principles of political justice.

That is to say, the epistemic account not only fails to capture the sense in which the criminal trial is a normative process, but also the sense in which it is a distinctly public normative process. If the trial was simply concerned with determining the truth, why would it matter that the trial is a public process (i.e., open to the public to observe, administered by public officials, governed by public rules, and so on)?[30] Moreover, why would the burden be on the state prosecutor—as a representative of the public—to prove the charges beyond a reasonable doubt? The public nature of modern trials reflects the idea that not only the accused and the victim have a stake in the legitimacy of trials. The epistemic account struggles to provide a principled reason for this idea. But from the perspective of political morality, the reason is simple: State power and coercion are always a matter of "public concern."[31]

The epistemic account's failure to capture the public dimension of criminal trials is further illustrated by the inapplicability of the rules governing trials to everyday moral interactions. Many of the normative principles that limit the search for truth in trials appear out of place in interpersonal contexts. Even if the values these limits express—such as fair process, privacy, and the presumption of innocence—are intelligible in everyday interactions, they do not play nearly as profound a role in those interactions. In everyday life, truth trumps procedure. Imagine you look at your friend's phone without permission and discover your friend is engaged in serious immoral conduct. I doubt many people would think that the appropriate response is to refrain from raising and acting on that

29. The so-called 'political turn' in criminal law theory stems partly from the recognition that an adequate account of the criminal law should explain the state's overarching control over the criminal law's operation, including criminalization, enforcement, and punishment. More generally, it stems from the need to justify the state's authority to carry out the criminal law as a legitimate public institution. See e.g. Malcolm Thorburn, "Criminal Law as Public Law" in RA Duff & Stuart P Green, eds, *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 21; Vincent Chiao, *Criminal Law in the Age of the Administrative State* (Oxford University Press, 2018).

30. For a similar point, see Antony Duff et al, "The Public Character of the Trial" in *The Trial on Trial*, *Volume Three: Towards a Normative Theory of the Criminal Trial* (Hart, 2007) 259 at 264-65.

31. Richard Dagger, "Republicanism and the Foundations of Criminal Law" in Duff & Green, *supra* note 29, 44 at 46.

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information due to a respect for your friend's privacy. In the criminal trial, things are different. Legal principles protecting individual privacy regularly prevent state officials from acting on information they unlawfully obtain. We therefore need an explanation for why truth does not enjoy such primacy in the context of a criminal trial. As we have seen, the epistemic account cannot satisfy this demand.[32]

2. Side-Constraint and Pluralist Accounts

Having examined the limitations of a truth-seeking account in its purest form, let us now consider more sophisticated versions favoured by those sympathetic to a predominantly epistemic understanding of the trial. Those who wish to foreground the truth-seeking function of the criminal trial often, when required to qualify the epistemic view, embrace one of two less purely epistemic accounts. While the building blocks for these alternative accounts are found throughout criminal law scholarship, they are rarely articulated or distinguished as such. Many theorists appeal to both interchangeably. This equivocation is understandable, given that each is a way to maintain a spotlight on the epistemic function of the trial while making room for normative considerations to shape that process. But they are conceptually distinct views of the purpose of the criminal trial, and to an extent carry distinct explanatory advantages and disadvantages.

A. The Side-Constraint Account

The first account holds that the criminal trial is still first and foremost a search for truth but that independent normative principles create side-constraints on that search. Goldman expresses this view in the following passage:

> Avoiding or deterring impermissible police methods is a *side constraint* on our adjudication system. Evidence may be excluded if that side constraint is violated. But the existence of such a side constraint should not belie the fact that the overarching goal of the system is truth determination.[33]

According to this account, the purpose of the trial is to search for the truth, but that search cannot proceed at any cost. The process of inquiry engages other values, what J.H. Wigmore called "rules of extrinsic policy," which can restrict the

32. There are, of course, more nuanced versions of the epistemic account, in addition to those discussed in section 2, that seek to explain the truth-seeking aim of the trial in light of the conditions for justified punishment and other normative purposes. See e.g. Sarah J Summers, "The Epistemic Ambitions of the Criminal Trial: Truth, Proof, and Rights" (2023) 4 Quaestio Facti 249. But insofar as these accounts recognize that normative considerations other than determining the truth are fundamental to the trial's purpose, they lead us to consider the alternative accounts described below to determine how these epistemic and normative considerations are connected. See also *infra* note 60.

33. Goldman, *supra* note 20 at 289 [emphasis in original].

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search for truth.[34] As Goldman explains, sometimes "independent" rights—that is, "rights flowing from sources other than the adjudication system itself (or its rationale)"—must constrain the epistemic function of trials.[35] Since this account takes the criminal trial's 'overarching goal' as determining the truth, it aims to explain most of the principles governing the trial as "wholly or at least largely as instrumental to the aim of truth-finding" and the "others [that] cannot be thus understood" as "side-constraints on the pursuit of that truth."[36]

The side-constraint account is a significant improvement over the epistemic account, as it largely avoids the fit objection. But it is vulnerable to a different challenge: Why should we let independent normative principles undermine the fundamental purpose of the trial?[37] This practice is especially puzzling if one accepts Susan Haack's claim that "however just the laws may be, and however just the administration of these just laws, if someone is found guilty of a crime he didn't commit … [o]r is found not guilty of a crime he *did* commit … a substantive injustice has been done."[38] It is not clear why we should allow such injustices for the sake of concerns external to the trial itself.

The most common answer to this question is that although some procedural and exclusionary rules are adverse to the trial's truth-seeking purpose, they are necessary to disincentivize wrongful police and prosecutor behaviour. For example, David Enoch, Talia Fisher, and Levi Spectre argue that with exclusionary rules, "the legal system expresses its willingness to *pay a price in accuracy* (certainly with regard to the case at hand, and maybe more generally too), in order to secure *some other* important goods (in this case, probably incentivizing the police not to obtain evidence illegally)."[39] The Supreme Court of the United States endorsed this deterrence-based explanation for side-constraints at one point, describing exclusionary rules as a "judicially created means of deterring illegal searches and seizures."[40]

But this response is unsatisfying for two reasons.[41] First, like all deterrence-based rationales, it does not offer a principled justification for the norms in question. If it turns out that exclusionary rules do not actually deter police

34. Wigmore, *supra* note 5 at 1019. See also Turner, *supra* note 14 at 35.
35. Goldman, *supra* note 20 at 284.
36. RA Duff et al, "Introduction: Towards a Normative Theory of the Criminal Trial" in Duff et al, *supra* note 5, 1 at 23.
37. See also IH Dennis, "Reconstructing the Law of Criminal Evidence" (1989) 42:1 Current Leg Probs 21.
38. Susan Haack, "Justice, Truth, and Proof: Not So Simple, After All" (2022) 6:1 Ius Dictum 7 at 7 & n 4 [emphasis in original].
39. David Enoch, Talia Fisher & Levi Spectre, "Does legal epistemology rest on a mistake? On fetishism, two-tier system design, and conscientious fact-finding" (2021) 31:1 Philosophical Issues 85 at 87 [emphasis in original, footnote omitted]. See also Tony Ward, "Improperly Obtained Evidence and the Epistemic Conception of the Trial" (2017) 81:4 J Crim L 328 at 333.
40. *Pennsylvania Board of Probation and Parole v Scott*, 524 US 357 at 363 (1998), citing *United States v Calandra*, 414 US 338 at 348 (1974).
41. For others, see RA Duff et al, "The Principle of Integrity" in Duff et al, *supra* note 30, 225 at 228-29; Christopher Slobogin, "Why Liberals Should Chuck the Exclusionary Rule" (1999) 2 U Ill L Rev 363.

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and prosecutorial misconduct, then there is no reason to maintain them.[42] Second, it does not explain why the legal system addresses these two independent concerns—determining factual guilt and deterring official misconduct—within the same process. If such side-constraints often interfere with the trial's main purpose, then we should, in principle, deal with police and prosecutorial misconduct elsewhere: through civil suits, criminal prosecution, or disciplinary proceedings. At most, this view justifies side-constraints on contingent considerations, such as limited judicial resources. Overcoming these concerns requires an account that considers the values that underpin the criminal trial's normative constraints as in some sense internal to the trial's purpose.

B. The Pluralist Account

A second alternative to the epistemic account does just that. That is, it takes these non-epistemic principles as internally important to the trial's purpose. This account holds that there are multiple purposes to the trial, only one of which is the determination of the truth. For the sake of evaluating this account, we need not specify these other purposes just yet. They might include upholding individual rights, maintaining public confidence in the administration of justice, or providing the accused with a fair trial.

This view is implicit in descriptions of the criminal trial that refer to "other values in play"[43] or "competing considerations"[44] beyond determining the truth. For example, Robert Summers argues that the trial aims at both "process values" and "good result efficacy."[45] Furthermore, he claims that these competing values justify divergences between what he calls "substantive truth" and "formal legal truth" (i.e., the 'truth' the court arrives at).[46] In a different context, Matt Matravers expresses this view when he argues that the phenomenon of jury nullification—where a jury renders a verdict of not-guilty despite being convinced of the accused's factual guilt—is justified because trials are concerned not only with the truth but also with the justification of criminal laws and their application.[47]

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42. It might also be questioned whether exclusionary rules constitute a coherent method of deterrence. A deterrence mechanism ordinarily requires that the target of deterrence is discouraged by the prospect of a sanction. As H. L. A. Hart explained, there is an important difference between applying a sanction to a person and merely not permitting them to do something. Exclusionary rules merely prevent police officers and prosecutors from adducing a certain piece of evidence or continuing with a proceeding; they do not themselves penalize or punish those actors. See HLA Hart, *The Concept of Law*, 3rd ed (Oxford University Press, 2012) at 33-35. Still, one might maintain that side-constraints indirectly deter misconduct by changing the incentive structure for police and prosecutorial operations. If this line of response works, however, it only amplifies the second objection.

43. Duff et al, *supra* note 36 at 23.

44. Jung, *supra* note 8 at 149.

45. Robert S Summers, "Evaluating and Improving Legal Processes—A Plea for 'Process Values'" (1974) 60:1 Cornell L Rev 1 at 1, 2.

46. Summers, *supra* note 22 at 497ff.

47. See Matt Matravers, "'More Than Just Illogical': Truth and Jury Nullification" in Duff et al, *supra* note 5, 71.

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Like the side-constraint account, the pluralist account addresses the fit objection. It also provides a plausible normative account of the trial as a public process insofar as it takes its principles of justice seriously on their own terms. Accordingly, it can respond to the objection that the side-constraint account cannot explain why the legal system should not, at least in principle, deal with the truth-seeking and deterrent functions of the criminal trial in separate procedures. If one of the purposes of the criminal trial is to, say, uphold the accused's right not to be convicted and punished without a fair and public process, then a criminal trial that violates this right fails in this purpose.

However, the pluralist account raises a new problem: How should courts balance these competing purposes? Because the pluralist account maintains that the criminal trial has multiple distinct purposes, it must hold that resolving conflicts between these purposes entails a loss in the realization of one of the trial's purposes. It is simply not clear how the law should balance these entirely separate goals. Goldman, in a passage that evokes a pluralist account, acknowledges this worry: "The difficult problem is to say how the truth-getting value should be *weighted* as compared with these other values. This is not a problem I shall try to settle."[48] As others have noted, an account that posits such independent and competing purposes builds a fundamental "kind of conflict, tension or compromise into the very structure of the criminal trial."[49]

Although the difficulty with balancing distinct goals is not a conclusive objection against the pluralist account, it compels us to ask whether it is possible to integrate these multiple purposes under a unified account. That is, an account that posits an overarching principle or framework that explains how conflicts between these competing purposes should be resolved. The demand for a unified account of the criminal trial is strengthened by the fact that legal officials often appear to assume that the trial has a cohesive purpose. When judges exclude probative evidence or reach acquittals for truth-irrelevant reasons, they do not suggest that they are making a trade-off between independent purposes. Judges do not suggest that they face the irresolvable conflicts that pluralism presupposes.[50] Rather, they seem to suggest that the state's ability to establish the truth and how it goes about

48. Goldman, *supra* note 20 at 284-85 [emphasis in original].

49. Duff et al, *supra* note 36 at 24.

50. It is true that in some jurisdictions the law requires judges to engage in something like a balancing exercise to determine whether to exclude evidence that was obtained in violation of the accused's rights. In Canada, for example, such evidence "shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." *Charter*, *supra* note 14 at s 24(2). The test developed in the case law for whether the admission of such evidence would bring the administration of justice into disrepute requires judges to assess and balance (a) the seriousness of the state misconduct; (b) the impact of the misconduct on the accused's rights; and (c) society's interest in adjudicating the case on its merits. See *Grant*, *supra* note 16 at para 71. However, the structure of this framework suggests that, although balancing is involved, judges are not balancing distinct purposes of the trial. Rather, they are applying a single principle—one that is fundamentally concerned with the integrity of the criminal justice system. Although the application of this principle involves assessing various concerns, the law suggests that its correct application helps achieve the purpose of the trial, rather than undermining one or more of its purposes.

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doing so are intertwined aspects of the same purpose of the trial—or, if you prefer, the same idea of criminal justice.[51]

3. Toward a Unified Account: Criminal Trials as Public Justification

We have identified two fundamental concerns of the criminal trial: (1) an epistemic concern with establishing the truth, and (2) a normative concern with the political morality of state power. The question we have been grappling with is whether there is a connection between these two concerns. We saw that attempts to understand the normative concern by way of the epistemic concern are unconvincing. We also saw that attempts to understand each concern as independent are unsatisfying. Let us try instead, then, to understand the epistemic concern by way of the normative concern.

The starting point of this account is the idea that the criminal trial is a public process concerned with determining, in each particular case, whether the state may legitimately use certain of its coercive state powers against the accused. This idea can be developed into a simple but powerful account that unifies the trial's epistemic and normative concerns. According to this view, the criminal trial is a procedure that calls upon the state to provide a public justification for the use of its criminal law powers to convict, condemn, and punish a specific person. The proposed account is unified because the principle of public justification in this context encompasses both epistemic and normative dimensions.

To publicly justify the conviction, condemnation, and punishment of the accused, the state must satisfy the normative and epistemic conditions for the legitimate use of these powers. The normative conditions require the state to show that the use of these powers is consistent with its commitment to its basic principles of political morality as expressed in law. The process of public justification thus involves ensuring that the state adequately respects the accused's constitutional rights, including the presumption of innocence, the right to silence, to privacy, to a speedy trial, and so on. Contra Goldman, these normative principles are not 'independent' of the trial's purpose. Constitutional rights may protect persons beyond the criminal trial, but that is because other instances of state coercion engage the same values and liberty-infringing concerns as the criminal trial. Indeed, many of the constitutional rights that shape trials are specifically concerned with the state's police and prosecutorial powers.

In the context of a criminal trial, the ideal of public justification also includes an epistemic condition: The state must sufficiently establish that the accused committed the charged crime for the use of its powers against the accused to be justified. Accordingly, this account incorporates what others have called the state's duty to provide accurate fact-finding procedures.[52] Truth matters,

51. To put the point in softer terms, the pluralist needs a framework that explains what unites the trial's multiple purposes and how to achieve the "right balance" between them. Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) at 73.

52. See Hamish Stewart, "Procedural Rights and Factual Accuracy" (2020) 26:2 Leg Theory 156.

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but not merely as an epistemic goal for its own sake. It matters because the justification for imposing the stigma and hard treatment connected to a criminal conviction depends on whether the accused in fact committed the offence. This differs from the side-constraint and pluralist accounts, which treat factual accuracy and other normative purposes as separate aims to be balanced or reconciled. On the public justification view, factual and normative conditions are integrated elements of a single justificatory standard governing the legitimate use of these powers in a particular case.

This account is consistent with the observation that the state is, of course, trying to accomplish something by convicting and punishing criminal offenders. The trial is not an exercise of justifying power for its own sake, but part of the state's pursuit of broader penal purposes—whether deterrence, rehabilitation, retribution, denunciation, or some combination of these aims. The key point, however, is that having such reasons does not by itself make the state's exercise of its punitive powers legitimate. The criminal trial exists to ensure that the conditions of justification are satisfied in the specific case at hand. These conditions may well, in a given legal system, make explicit reference to the state's reasons for conviction and punishment. For example, where the state seeks to impose a specific sentence for deterrence purposes, the court might ensure that the state has demonstrated that the sentence would indeed have the contemplated deterrent effect—in addition to other normative conditions that apply regardless of the state's purpose. On this account, what requires justification is not the existence of the criminal trial or of the state's penal powers in general, but the use of those powers against a particular accused person. Put differently, the state qua judiciary is holding the state qua executive to a justificatory burden—one that includes both epistemic and normative conditions, and that ensures conviction and punishment are consistent with the rule of law and the principles of legality.

Although this account is firmly rooted in principles of political morality concerning the proper relationship between the state and individuals, it does not claim that criminal trials are not about truth. Nor does it claim that trials are about truth plus something else. Rather, it claims that criminal trials have an overarching purpose—the public justification of the state's use of its powers to convict and punish a person who is alleged to have committed a criminal offence—and establishing the truth of that allegation is a necessary but not sufficient element of that public justification where the accused maintains their innocence. Indeed, the public justification account presupposes that a conviction cannot be legitimate without sufficient evidence proving the accused committed the offence. A trial conducted in the absence of such evidence could never satisfy the state's burden of public justification, however procedurally impeccable it might otherwise be.

The idea that the criminal trial is an exercise in public justification is supported by the basic principles of liberalism and other theories of the state that take individual rights seriously. As Joel Feinberg explains, under liberalism there is a "'presumption in favor of liberty'," meaning that "[l]iberty should be the norm;

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coercion always needs some special justification."[53] Because criminal convictions carry liberty-infringing and other coercive consequences, a liberal legal system requires the state to satisfy its justificatory burden in every instance it seeks such a conviction. This understanding of the trial aligns with the view that a liberal theory of legal punishment must show how punishment can be consistent with the rights of the punished person.[54] Indeed, there is wide agreement among liberal political philosophers that the paradigmatic object of public justification is the state's use of coercive power.[55] And the state's power to enforce the criminal law, especially its power to convict and then punish offenders, is arguably the paradigmatic instance of coercive state power.

This account finds its roots in John Rawls' influential articulation of the principle of public justification.[56] The principle of public justification gives philosophical expression to a familiar idea about legality that is captured throughout public law doctrine.[57] Put simply, the state must act and justify its decisions according to law. In Rawls' more philosophical terms, the state must justify the use of coercive force with public reasons that appeal to principles and values that every reasonable citizen could accept. A public justification must address all citizens, because all have an interest in the legitimate use of the state's coercive powers. In the process of offering a public justification, the state must respond to the reasons offered by those who reasonably disagree with the proposed use of such power. In the context of a criminal trial, this person is principally, but not only, the accused who maintains their innocence.[58]

We can think of the criminal law's various institutions and procedures—in particular, criminal courts, which Rawls described as an "exemplar of public reason"—as forums through which the state engages in the public justification of not only the content of the criminal law, but also its application in particular cases.[59] The public justification of the state's power to enforce the criminal law is not, of course, exhausted by the criminal trial alone. The process of justification begins long before the trial with the justification of the state's authority and the constitutional scope of its criminalization and punishment powers. Where the state seeks to exercise its power to convict a specific person who maintains their innocence, and the subsequent powers to condemn and punish that person, the

53. Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (Oxford University Press, 1987) at 9.

54. See e.g. Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (Oxford University Press, 2009) at 2-5; Corey Brettschneider, "The Rights of the Guilty: Punishment and Political Legitimacy" (2007) 35:2 Political Theory 175.

55. See Kevin Vallier, "Public Justification" in Edward N Zalta & Uri Nodelman, eds, *The Stanford Encyclopedia of Philosophy* (Winter 2022), online: plato.stanford.edu/archives/win2022/entries/justification-public/

56. See John Rawls, *Political Liberalism* (Columbia University Press, 1996) at 9-10. The account proposed here is a more fine-grained application of Rawls's version of the principle of public justification. Rawls applied public justification at the level of constitutional principles and basic political institutions. The proposed account applies it to a specific instance of state coercion against a specific person.

57. See e.g. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

58. See John Rawls, *Justice as Fairness* (Harvard University Press, 2001) at 26-27.

59. Rawls, *supra* note 56 at 236.

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criminal trial is a critical step in this justificatory process. It is the step that requires the state to demonstrate that the normative and factual conditions for exercising these powers are satisfied in this particular case.[60]

One important upshot of the public justification account concerns the nature of the verdict. Unlike most discussion of criminal trials, the public justification account does not view the verdict as a straightforward propositional statement about the accused's factual guilt. Rather, it is a statement about the legal process itself. The truth the verdict aims to express is whether the state satisfied its legal burden. That burden involves the demonstration of empirical facts concerning the accused's conduct. But the verdict is not reducible to a statement of empirical fact.[61] Rather, the verdict expresses whether the state met its justificatory burden for a guilty verdict and, ordinarily, a corresponding conviction.

On this view, the verdict in a case where a factually guilty person is found not guilty (i.e., not legally guilty) because of unlawful state conduct is not "erroneous"[62] or a "miscarriage of justice."[63] Such verdicts may be correct if we understand them to concern whether the state publicly justified the use of its powers to convict and punish the accused.[64] Unlike the epistemic or mixed accounts, the practice of acquitting factually guilty persons does not by itself pose a problem for the public justification account. The state may simply have not satisfied one or both elements of its burden of justification. In this case, the outcome is not best described as a trade-off between independent goals, or even as the loss in the realization of one goal to realize another. Determining factual guilt is not one of several aims, but a systematic requirement. And like other systematic requirements, it is necessary but not sufficient.

Notice also that the public justification account can perhaps help explain why victims and their families are so frequently dissatisfied with acquittals for so-called 'technical' evidentiary or procedural reasons. This frustration seems to stem in part from the widespread acceptance of the epistemic understanding of trials. A more nuanced understanding of the trial as a process that is largely

60. One might accept that the criminal justice system is collectively concerned with the legitimacy of the state's use of coercive power but argue that the trial is the process concerned solely with the factual dimension of such legitimacy. This view would allow one to hold that truth is only one element of the broader normative question yet maintain that the trial is a search for the truth. While a legal system could conceivably be designed in such a way, it is not how common law systems are currently designed. As explained above, the criminal trial in such systems is concerned not only with the truth, but also with truth-irrelevant normative considerations focused on the relationship between the state and the accused.

61. This feature is shared by the other accounts of the intrinsic value of criminal trials discussed below.

62. Summers, *supra* note 22 at 506.

63. Rawls, *supra* note 5 at 75.

64. This conception of the verdict aligns with the former Chief Justice of Canada's statement that "a criminal trial does not address 'factual innocence'. The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of the criminal law." Newfoundland and Labrador, *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken: Report and Annexes* (Office of the Queen's Printer, 2006) at 342.

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focused on but not reducible to a search for truth might lessen such disappointment.

This conception of the trial avoids the challenges against instrumentalist accounts, such as a purely truth-seeking account. R.A. Duff has argued that such instrumentalist accounts cannot account for the importance of the accused's right to be present, mentally fit to stand trial, and offered the opportunity to answer the accusation.[65] The public justification account, however, can incorporate such principles as conditions for a publicly justified conviction and punishment. More generally, the significance of public justification is not as a mere efficient means to a further end. Nor is its value reducible to some other value. It has independent value as an overarching principle of political morality in the context of coercive state power. We care not only about whether a crime occurs, but also about how the state responds to the alleged crime.

Yet the public justification account differs from other accounts of the criminal trial's intrinsic value. One prominent version of such an account views the criminal trial as an exercise in moral accountability. Duff, for example, argues that the criminal trial is a procedure for calling individuals to answer the charge of public wrongdoing and, if that wrongdoing is proven, calling those individuals to account.[66] John Gardner expresses a similar view, although without the emphasis on public wrongdoing, when he writes that the trial is merely an institutionalized form of the ordinary moral practice of calling on others to offer an explanation for perceived moral wrongs.[67] On this view, the purpose of the trial is moral communication and accountability.

While I do not doubt that trials involve a valuable form of communication between the state (or the public) and the accused, this account does not fully capture the trial's concern with the legitimate use of coercive state power. The moral value in calling wrongdoers to account does not by itself justify the state's power to condemn, let alone punish, wrongdoers. As others have noted, including Duff himself, there is an explanatory gap between identifying moral wrongdoing and justifying state coercion.[68] The public justification account addresses this gap by focusing directly on the legitimacy conditions for such coercion.

Moreover, the public justification view can include aspects of the moral accountability account's explanation for the non-epistemic evidentiary and procedural rules—such as the requirement that the accused be fit to stand trial, as mentioned earlier—while also explaining other evidentiary and procedural rules that appear in tension with moral accountability. For example, the public justification account readily explains why criminal trials are limited to wrongs that have

65. See e.g. Antony Duff, *Trials and Punishments* (Cambridge University Press, 1986) at 110-19.
66. See *ibid* at ch 4; RA Duff, *The Realm of Criminal Law* (Oxford University Press, 2018) at 30-36; RA Duff, "Blame, Moral Standing and the Legitimacy of the Criminal Trial" (2010) 23:2 Ratio 123; Duff et al, "Calling to Answer" in Duff et al, *supra* note 30, 127; RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart, 2007) at ch 8.
67. See John Gardner, "Introduction" in HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (Oxford University Press, 2008) xiii at xlix; John Gardner, "The Mark of Responsibility" (2003) 23:2 Oxford J Leg Stud 157.
68. See Thorburn, *supra* note 29 at 23-24; Chiao, *supra* note 29 at 27-33; Duff, *supra* note 65 at 36.

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already been expressly prohibited by the state. If, as Gardner suggests, trials are continuous with interpersonal moral accountability, this basic feature of the trial is puzzling. So too is the accused's right to silence if the purpose of the trial is moral dialogue. It is also puzzling why exclusionary rules relating to police misconduct should limit the accused's moral accountability.[69] While Duff's claim that state misconduct affects the state's standing is promising, this argument appears better expressed in terms of the state's authority to exercise coercive powers rather than to engage in valuable moral communication.[70] Does the police's unlawful collection of evidence really prevent it from calling an accused murderer to morally account? At most, this account suggests that the state should call police wrongdoers to account too, which gives rise to the separate proceedings objection we saw earlier.

Finally, the public justification account explains how guilty pleas (where an accused is convicted by admission of guilt without ever going to trial) are consistent with the role of trials. The moral accountability account, like the epistemic account, struggles to explain the legitimacy of such convictions. Guilty pleas neither allow for an epistemic inquiry into the truth of the charge, nor for the valuable moral dialogue and accountability that occur through a trial.[71] The public justification account, however, provides a straightforward explanation for this phenomenon: Consent is one way to justify the imposition of state coercion that is consistent with the liberal presumptions of autonomy and liberty.[72]

The public justification account also differs from accounts that explain the intrinsic value of criminal trials entirely in terms of state accountability. According to such a view, the purpose of the trial is, to borrow the words of the Supreme Court of the United States, "to prevent oppression by the Government."[73] Hock Lai Ho has defended this account, writing that the criminal trial is fundamentally "a process of calling upon the executive to account for its request to have a citizen officially condemned and punished for an offence."[74] According to Ho, the trial's purpose is to protect the "rule of law" by providing a "system of checks and balances" that prevents the "executive from securing a guilty verdict through its own unlawful conduct."[75] This view emphasizes the

69. See Mike Redmayne, "Theorizing the Criminal Trial" (2009) 12:2 New Crim L Rev 287 at 302-10.
70. See Duff et al, *supra* note 30 at 45, 225-58.
71. See Jung, *supra* note 8 at 155.
72. We might nonetheless have concerns with the contemporary practice of plea bargaining, given the incentive structure and power imbalance between the prosecutor and the accused in present day criminal justice systems. The validity of plea agreements under such conditions—especially those subject to negotiations—is questionable. Notice, though, that the public justification account captures how the worry with coerced pleas is not only with factual innocence but, as with all cases of involuntary consent, with whether the circumstances undermined the normative significance of the agreement. For the purposes of this article, however, the critical point is that pleas are not in principle inconsistent with a publicly justified conviction. For an overview of the rise of plea bargaining and its many problems, see Mary Vogel, "Plea Bargaining under the Common Law" in Brown, Turner & Weisser, *supra* note 14, 728.
73. *Williams v Florida*, 399 US 78 at 100 (1970).
74. Hock Lai Ho, "Liberalism and the Criminal Trial" (2010) 32:2 Sydney L Rev 243 at 245.
75. Hock Lai Ho, "The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence" (2016) 10:1 Crim L & Philosophy 109 at 109.

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criminal trial's role in ensuring that law enforcement is "*properly conducted*," which requires examining "how the executive had deployed its powers against [the accused] prior to the trial."[76]

While the public justification account builds upon Ho's insight that the trial is not merely concerned with the accused's conduct, it does not frame the purpose of the trial as narrowly.[77] In one sense, the state accountability account is the opposite of the epistemic account. The epistemic view fails to make sense of the trial's rules that focus on state misconduct. The state accountability view suggests that the point of the trial is to uncover state misconduct. But, characterized so, the importance of determining the accused's factual guilt is less clear. At worst, truth seems to fall out of the picture. At best, this view seems to collapse into the pluralist or side-constraint accounts. However, by integrating the epistemic and normative features of the trial, the public justification account captures how the trial's concern with state misconduct is related to its concern with the truth.

Before concluding, I would like to briefly highlight how the public justification account responds to the problem of wrongful convictions. It is often remarked that no matter how perfectly designed, the criminal process can never eliminate the risk of innocent persons being convicted. Perhaps this risk means that no criminal convictions can ever be justified. If that is right, the idea of public justification may provide the appropriate framework for explaining why. But even if it is not, the view that trials are an exercise in public justification can incorporate a concern for the injustice of wrongful convictions. One obvious way it does so is by upholding the importance of epistemically focused rules of evidence and procedure. But another way is by explaining how the state has post-conviction commitments that respond to the possibility of wrongful convictions.

The public justification of coercive power is not a ladder that the state can kick away once climbed. The justification for state coercion is always ongoing, especially for temporally extended uses of power, such as a prison sentence or designating somebody as a convicted offender. An integral aspect of the state's justification for every use of its criminal law power to convict must therefore be a future-facing commitment to continue assessing any new evidence that comes to light and to bring any exculpatory evidence to court to overturn the conviction. To publicly justify the use of its coercive powers to convict and punish, the state must first express its commitment to overturn the conviction should the factual bases for the conviction turn out to be erroneous or insufficient. The need to revise a conviction if exculpating evidence comes to light is part of the same idea of publication justification. This account is also consistent with the view that the state has a duty to compensate those who are discovered to have

76. Ho, *supra* note 74 at 246 [emphasis in original, footnote omitted].
77. However, the public justification account does align with some of Ho's broader descriptions of the trial: see *ibid*.

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been wrongfully convicted. Again, such a duty of redress may be one of the normative conditions for the public justification of any conviction.

Notice, however, that there is no symmetrical requirement that the state retry unsuccessful criminal proceedings if new inculpatory evidence comes to light. The public justification account can explain rules preventing retrials, such as the double jeopardy rule, as one of the normative conditions of a publicly justified conviction. While other accounts struggle to capture this basic principle of the trial, the public justification account can explain a prohibition on retrying the same person for the same crime as part of the legitimacy conditions for a justified conviction in the first instance.

Conclusion

This article explored the relationship between criminal trials and truth. I raised objections to purely truth-seeking, side-constraint, and pluralist accounts. I argued that none of these accounts, as usually conceived, adequately explain how the trial's normative principles relate to its epistemic principles. In response, I developed an account that views the criminal trial, at its core, as a normative exercise in public justification. According to this account, the criminal trial is an irreducibly public legal process concerned with the legitimate use of specific coercive criminal law powers. This account nonetheless affirms the importance of establishing the truth because doing so is a necessary element of a publicly justified conviction and punishment.

Although the analysis here has largely presented the side-constraint and pluralist accounts in contrast to the public justification view, the latter can also be seen as building on and refining the central insights of both. It preserves the insight that determining the truth of the accused's factual guilt is necessary but not sufficient to a legitimate conviction, while rejecting the idea that it is merely one aim to be pursued alongside other independent aims. Instead, factual and normative constraints are integrated aspects of the idea of public justification that governs the legitimate use of the state's coercive powers in every case.

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